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FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1979

No. 78-5420

THEODORE PAYTON,

Appellant,

vs.

NEW YORK,

Appellee.

No. 78-5421

OBIE RIDDICK,

Appellant,

vs.

NEW YORK,

Appellee.

Appeals from the New York Court of Appeals

SUPPLEMENTAL BRIEF FOR APPELLANTS

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SUPPLEMENTAL BRIEF FOR APPELLANTS

This brief is submitted to inform the Court of one court decision and several articles which have appeared since the original briefs were filed, to address an issue which arose during oral argument on March 26, 1979, and to respond to contentions advanced by appellee in its Supplemental Brief.

I.

Preface

Since the main briefs in these cases were filed, the Eighth Circuit has held that a warrantless entry to arrest in a private dwelling is violative of the Fourth Amendment. *United States* v. *Houle*, —— F.2d ——, No. 78-1876 (8th Cir. August 17, 1979). Several articles supporting appellants' position have also appeared. Note, *The Constitutionality of Warrantless Home Arrests*, 78 Colum. L. Rev. 1550 (1978); Kelder, *Criminal Procedure*, 30 Syracuse L. Rev. 15, 64-71 (1979); O'Connor, *4th Amendment and Warrantless Home Arrests*, New York Law Journal, pp. 1, 2 (September 18, 1979); Comment, *Warrantless Arrests in Homes: Another Crisis for the Fourth Amendment*, 7 Ford. Urb. L.J. 93 (1978-1979).

II.

At a minimum, when a police officer seeks to arrest a person in his own home, absent exigent circumstances, the Fourth Amendment requires that he possess an arrest warrant and that he have probable cause to believe that the person named in the warrant is at home when the warrant is executed.

a.

At the first argument of these cases, the question arose, assuming a warrantless entry to arrest is violative of the Fourth Amendment, what type of warrant is required? (Tr. Oral Arg. pp. 40-41). Our position, although as stated the cause of some confusion, was that an arrest warrant plus reasonable cause* to believe the person

* It was not our intention to differentiate between reasonable cause and probable cause.

named in the warrant was at home at the time the warrant was executed would suffice (Tr. Oral Arg. p. 47).

We adhere to this position but wish to make it clear that we view this as a minimal Fourth Amendment requirement; one that is a sufficient basis for reversal of the two judgments in the cases at bar. For in these cases the New York statutory provisions at issue authorized entries into private dwellings without any warrant, and the police, in fact, possessed none. Moreover, both cases involved arrest entries into the homes of the suspects themselves, not into the homes of third persons for which, as we later point out, the argument for a search warrant requirement is thought by many to be exceptionally strong.

We also do not quarrel with the proposition that a search warrant, which requires a magistrate to make the dual determination—that there is probable cause to believe the person sought has committed a crime and that there is a sound basis for authorizing entry into particular premises—would afford greater protection to the privacy interests in the home than would an arrest warrant. And we believe there is much to be said for the position that the Fourth Amendment can be read to require a search warrant. See, Rotenberg & Tanzer, *Searching for the Person to Be Seized*, 35 Ohio St. L.J. 56, 67 (1974); *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 Stan. L. Rev. 995 (1974); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 358-360 (1974).[1]

1. Indeed, the recent amendment of Rule 41(b) of the Federal Rules of Criminal Procedure by the Court so that it now provides for issuance of a search warrant for a "person for whose arrest there is probable cause, or who is unlawfully restrained" [47 U.S.L.Wk. 4488, 4491 (May 1, 1979)] supports the view that a search warrant is required, particularly if the statement is accurate that "Rule 41 implements the Fourth Amendment . . ." *Jones* v. *United States*, 357 U.S. 493, 498 (1958).

However, we think it unnecessary to insist that in these cases, which involve warrantless entries into the homes of the persons sought, only a search warrant can protect adequately the privacy interests at stake. We believe there is more than ample support for this position in prior decisions of this Court, in decisions of lower federal courts and state courts and in the opinions of scholars who have examined the question.

Should our net be thus too narrowly cast, the Court believing that a search warrant, not an arrest warrant, is required, appellants Payton and Riddick would still be entitled to reversals because of the entirely warrantless entries in their cases. And we would welcome such a result. But under the circumstances of these cases, where there are available to the Court several methods of resolution, we see no benefit to appellants to insist that only a search warrant could have validated the police conduct here in question.

The Court's prior statements about arrest warrants, either explicit or implicit, strongly support the conclusion that an arrest warrant affords meaningful protection to the privacy interests of persons sought by police in their own homes. For example, in *Jones* v. *United States*, 357 U.S. 493 (1958), the Court appears to have assumed that an arrest warrant would have validated the entry in that case when it stated that a warrantless entry to arrest would present the

> grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment.

357 U.S. at 499-500. To similar effect is the statement (per Mr. Justice Stewart) in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) that "[t]he case of *Warden* v. *Hayden*, *supra*, where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances." 403 U.S. at 480-481.

The Second Circuit, which held in *United States* v. *Reed*, 572 F.2d 412 (2d Cir. 1978) that an entry without an arrest warrant violated the Fourth Amendment, has read these statements and others as indicative of this Court's acceptance of arrest warrants in some circumstances:

> Although we need not and do not decide this question here, we note that counsel's decision not to argue this point [that a search warrant is required] seems to be in accord with hints by the Supreme Court that, at least in some circumstances, an arrest warrant may be all that is required for law enforcement officers to enter a private residence, or to search that residence, for purposes of arresting the subject of the warrant.

United States v. *Hammond*, 585 F.2d 26, 28 n.1 (2d Cir. 1978).[2]

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2. In addition to *Jones* and *Coolidge*, the court of appeals in *Hammond* cited *Harris* v. *United States*, 331 U.S. 145, 153 (1947), *Chimel* v. *California*, 395 U.S. 752, 755 (1969) and *United States* v. *Lefkowitz*, 285 U.S. 452, 463-464 (1932). To that list, we would also add *Agnello* v. *United States*, 269 U.S. 20 (1925), in which the entry into defendant Alba's home made pursuant to an arrest warrant

(footnote continued on next page)

This reading of the Court's assessment of the efficacy of arrest warrants would seem buttressed further by its recent decision in *Dalia* v. *United States,* —— U.S. ——, 60 L.Ed.2d 177 (1979). There the Court, per Mr. Justice Powell, rejected the argument that separate authorization must be obtained for a surreptitious entry into private premises to place electronic surveillance equipment and emphasized the distinction between a warrant's content and the manner of its execution, referring specifically to an arrest warrant situation:

> Often in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant. For example, police executing an arrest warrant commonly find it necessary to enter the suspect's home in order to take him into custody, and they thereby impinge on both privacy and the freedom of movement. See, e.g., *United States* v. *Cravero,* 545 F.2d 406, 421 (CA5 1976) (on petition for rehearing).

60 L.Ed.2d at 193.

The *Cravero* case, cited in *Dalia,* holds that the Fourth Amendment is not violated when police, armed with a valid arrest warrant, enter private premises to execute the warrant. The Fifth Circuit rejected the argument that only a search warrant could legitimate such an entry, reasoning that once there is an arrest warrant naming the person, "there is no need to particularize the search—the arrest

was not questioned. 269 U.S. at 30; *McDonald* v. *United States,* 335 U.S. 451, 459 (1949) (Mr. Justice Jackson, concurring); *United States* v. *Jeffers,* 342 U.S. 48, 50 (1951). The Court's opinions in both *McDonald* and *Johnson* v. *United States,* 333 U.S. 10 (1948), which seem to support a search warrant requirement, were written, nonetheless, in cases in which no warrant of any kind had been obtained.

warrant has already done that. There is not the same danger of the 'general writ' which is the reason for requiring that a search warrant describe what specific items police are allowed to search for." 545 F.2d at 421 n.1. In *United States* v. *Woods,* 560 F.2d 660 (5th Cir. 1977) the court suggested further that its *Cravero* holding, which concerned entry into third-party premises, applied *a fortiori* where officers entered the premises belonging to the subject of the arrest warrant. 560 F.2d at 666. Many other courts share the same view. See, *e.g., United States* v. *Harper,* 550 F.2d 610, 613-614 (10th Cir.), *cert. denied,* 434 U.S. 837 (1977); *United States* v. *Brown,* 467 F.2d 419 (D.C. Cir. 1972) (opinion of Mr. Justice Clark); *United States* v. *McKinney,* 379 F.2d 259, 262-263 (6th Cir. 1967); *Lankford* v. *Gelston,* 364 F.2d 197, 205-206 (4th Cir. 1966); *United States* v. *Joines,* 258 F.2d 471 (3d Cir. 1958);[3] *People* v. *Wolgemuth,* 69 Ill.2d 154, 370 N.E.2d 1067 (1977), *cert. denied,* 436 U.S. 908 (1978); *Commonwealth* v. *Terebieniec,* —— Pa. ——, 25 Crim. L. Rep. 2502 (Sept. 12, 1979) (Pa. Super. Ct.); but see, *United States* v. *Sumlin,* 567 F.2d 684, 686 n.1 (6th Cir. 1977), *cert. denied,* 435 U.S. 932 (1978); *United States* v. *Ford,* 553 F.2d 146, 159 n.45 (D.C. Cir. 1977).

Appellee's main objection to an arrest warrant requirement is that it does not provide enough protection for the home. (Supp. Br. pp. 5, 6). As we have shown in our main brief, however, the arrest warrant provides substantial

3. The original decision in *Joines* (246 F.2d 278) was vacated by this Court and remanded for consideration in light of *Jones* v. *United States,* 357 U.S. 493 (1958). 357 U.S. 573 (1958). The court of appeals adhered to its affirmance of the conviction because entry into the suspect's premises had been made for the purpose of executing an arrest warrant. *United States* v. *Joines,* 258 F.2d 471, 472-473 (3d Cir. 1958). Thereafter, the Court denied certiorari. 358 U.S. 880 (1958).

protection for the privacy of homes. (Br. at 31-35). Indeed, appellee concedes that "[a]ny restriction on the authority of police officers to make arrests inside a dwelling would provide some protection for the privacy of the home," and that a magistrate's review would undoubtedly screen out "some arrests, not based on probable cause to believe the defendant committed a crime, that would have been effected in a dwelling." (Supp. Br. p. 5). We think these are important concesssions, because they render untenable appellee's denigration of the value of an arrest warrant requirement.

Appellee's argument not only ignores the common sense conclusion that once there are legitimate privacy interests to be protected, some protection is better than none, it overlooks entirely the reality that when the premises to which entry is sought pursuant to an arrest warrant are those of the person named in the warrant, it is the magistrate's determination that there is probable cause to believe the person has committed a crime that is of predominant importance. As Professor LaFave has observed:

> But where the premises to be entered are those of the person sought to be arrested, it is less certain whether it is the protection of an arrest warrant or the protection of a search warrant which is most needed. Some commentators have argued in favor of search warrants even in these circumstances on the ground that it is desirable here as well to have a judicial determination of the question whether the wanted person is probably in the place to be entered. The contention is not without substance, although it may well be argued that the need for a judicial determination on this probable cause question is less substantial because (for the reasons noted in the preceding subsection) it is of necessity often resolved as a matter of inference from

> a lack of information indicating the defendant is elsewhere. Stated another way, it might well be contended that protection of the privacy of the suspect's premises is more likely to be enhanced by a judicial determination of the suspect's probable guilt than of this probable presence at home.

2 W. LaFave, Search and Seizure 385 (1978).[4]

Appellee's contention that an arrest warrant requirement would undercut *United States* v. *Watson*, 423 U.S. 411 (1976) is also wrong. A holding in this case that an arrest warrant is required would be entirely consistent with *Watson*. As we emphasized in our main brief (pp. 30-31), *Watson* determined that warrantless public arrests were reasonable because they had been universally accepted for so long. 423 U.S. at 423-424. Not only is that not true for arrests in private dwellings (Br. pp. 40-55), the Court in *Watson* was simply not required to focus on the interests affected by "the physical entry of the home [which] is the chief evil against which the wording of the Fourth Amendment is directed . . ." *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972). It is one thing to allow "logic to defer to history" and permit a police officer to make an arrest in public based on his assessment of probable cause. It is quite something else to ignore logic when there is no

4. Commenting on the argument for a search warrant requirement even for entry into a suspect's own premises, the Advisory Committee Note on the amendment to Rule 41 observed that:

> Case authority in support is lacking, and it may be that the protections of a search warrant are less important in such a situation because ordinarily "rudimentary police procedure dictates that a suspect's residence be eliminated as a possible hiding place before such a search is conducted elsewhere." *People* v. *Sprovieri*, 95 Ill. App.2d 10, 238 N.E.2d 115 (1978).

Advisory Committee Note, *Proposed Amendments to Federal Rules of Criminal Procedure*, 75-76 (1978).

compelling history and to permit a police officer to enter a person's home without requiring that a magistrate make the probable cause determination.

b.

Our position that the Fourth Amendment is satisfied by an arrest warrant when it is executed reasonably in the premises of the person named in the warrant does not mean that a search warrant (or "special warrant" as appellee wishes to call it) requirement would be an unsound reading of the Amendment. To the contrary, noted scholars have advanced logical arguments for such an interpretation. Rotenberg & Tanzer, *supra,* 35 Ohio St. L.J. 56; O'Connor, *supra, 4th Amendment and Warrantless Home Arrests,* New York Law Journal, September 18, 1979, pp. 1, 2; Amsterdam, *supra,* 58 Minn. L. Rev. at 360. Also, a substantial body of judicial opinion has developed which holds that particularly with respect to arrest entries into dwellings of third persons, only a search warrant requirement will suffice because an arrest warrant issued for A affords no protection at all for B whose premises are the subject of the entry. See, *e.g., Government of the Virgin Islands* v. *Gereau,* 502 F.2d 914, 928-929 (3d Cir. 1974), *cert. denied,* 424 U.S. 917 (1976); *Rice* v. *Wolff,* 513 F.2d 1280, 1291-1292 (8th Cir. 1975), *rev'd sub nom. Stone* v. *Powell,* 428 U.S. 465 (1976); 2 W. LaFave, SEARCH AND SEIZURE, *supra,* at 384. But even with respect to entries into the homes of suspects themselves, a search warrant, by definition, would provide maximum protection for the privacy interests at stake. And as appellee has noted (Supp. Br. p. 3), the Ninth Circuit has insisted that the warrant, whatever it is called, describe both the place to be searched and

the person to be seized. *United States* v. *Prescott,* 581 F.2d 1343, 1350 (9th Cir. 1978). See, also, *Dorman* v. *United States,* 435 F.2d 385, 402 n.6 (D.C. Cir. 1969) (Wright, J., concurring and dissenting).

There is also no sound basis to appellee's argument that a search warrant would be an exceptionally onerous burden on the police. The crux of the argument advanced appears to be that "[p]eople are mobile" and that the "basis for believing a particular person is in a particular place may change from moment to moment." (Supp. Br. p. 3). It may be true if a search warrant is required that in some instances a warrant issued for specific premises would have to be updated if the person sought was known to have moved. But the incidence of that occurring where the warrant issued is for the person's home would be relatively slight. Cf. 2 W. LaFave, SEARCH AND SEIZURE, *supra,* at 371. The most important consideration, however, is that if the circumstances are not exigent, then the additional necessity of updating a warrant because a person has moved is insignificant when weighed against the privacy of the home and the Court's steadfast refusal to dispense with the warrant requirement in non-exigent circumstances. *Mincey* v. *Arizona,* 437 U.S. 385, 393-395 (1978).

We also take issue with appellee's assertion that the police in Payton could not have obtained a search warrant. (No such argument is even proffered in *Riddick.*) That the police observed a light under Payton's door and heard the sound of a radio from within did not convert a non-exigent circumstance into one of exigency. Nor can it be

said that a magistrate could not have determined that there was a reasonable basis for authorizing entry into Payton's apartment before the police approached his door. The apartment was his and the police lacked meaningful information that he was not at home. See, *People* v. *Sprovieri*, 95 Ill. App.2d 10, 238 N.E.2d 115 (1978).

Thus, the police could easily have obtained search warrants in both cases at bar because of the lack of exigency in each. In addition to the crucial protection provided by an arrest warrant—the magistrate's review of the difficult question of probable guilt—the search warrants would have provided additional protection by affording review of the more routine question of where appellants lived. Because of the value placed on the privacy of the home, this Court could well decide that the fuller protection of the search warrant is required in cases such as these. In light of the substantial protections afforded by both arrest and search warrants, however, one thing is clear—an entry into a private home without any form of warrant whatsoever is an unreasonable search and seizure under the Fourth Amendment.

III.

Michigan v. _DeFillippo_, —— U.S. ——, 61 L.Ed.2d 343 (1979), furnishes no basis upon which appellant Payton can be denied the relief which is compelled by a determination of unconstitutionality.

Appellee again urges the Court to affirm the judgment in the *Payton* case even if it declares the New York statutory provisions at issue unconstitutional. This time the argument is premised on the Court's opinion in *Michigan* v. *DeFillippo*, —— U.S. ——, 61 L.Ed.2d 343 (1979). (Supp. Br. pp. 7-12). Not only does *DeFillippo* furnish no basis for appellee's claim, we believe the Court's very analysis in *DeFillippo* parallels that which is presented in our Reply Brief at pp. 11-12.

The Court's opinion, as does our previous submission, emphasizes specifically the distinction between a statute which is "relevant to the validity of the arrest and search only as it pertains to the 'facts and circumstances' " which constitute probable cause for arrest and those "which, by their own terms, [authorize] searches under circumstances which [do] not satisfy the traditional warrant and probable cause requirements of the Fourth Amendment." 61 L.Ed. 2d at 351. It is the latter type of statute which is involved in these cases, for it is the statutes themselves which authorized warrantless entries to arrest in both.

Conclusion

The judgments of the New York Court of Appeals should be reversed.

Respectfully submitted,

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